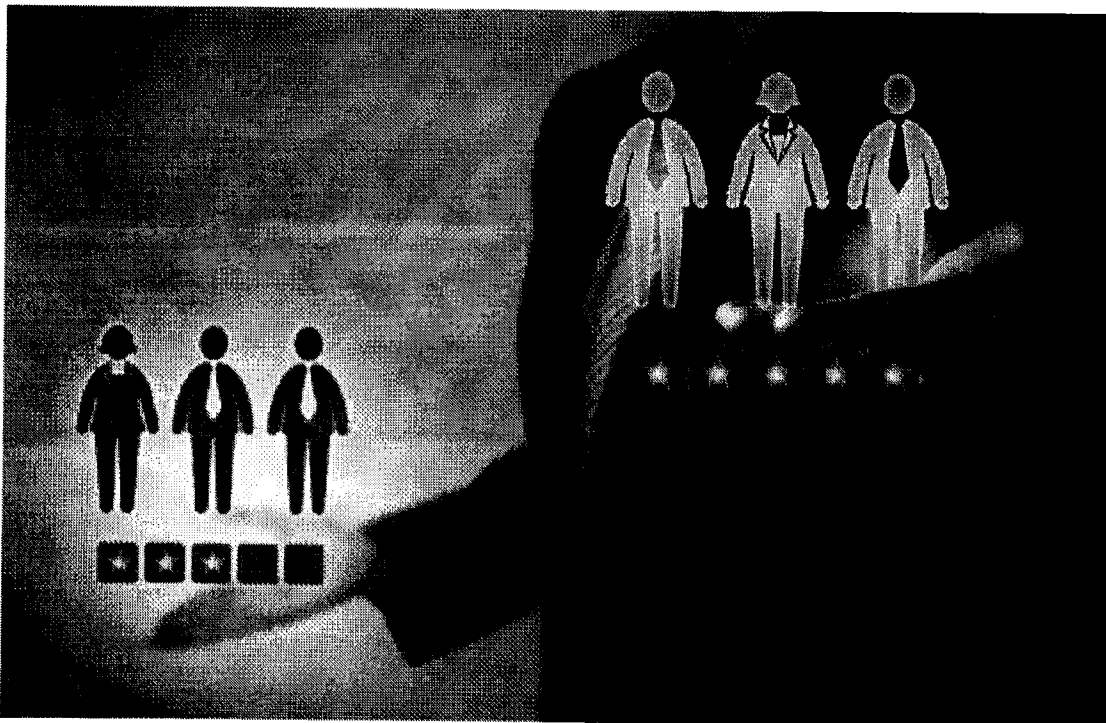


A Pursuit of Justice

Examining the Intersection of Business, Law, and Politics

🕒 March 26, 2018 📁 Court Administration, Judicial Philosophy, Political Choices

Holding Judges Accountable — Fair Judicial Performance Evaluations Needed in Maryland



The link between the lack of progress toward abolishing contested judicial elections of circuit court judges and the failure of the State of Maryland to create a rigorous but fair program of Judicial Performance Evaluations is unmistakable. The risk of abuse of even a fair and impartial system of Judicial Performance Evaluations in a contested judicial election is real. That risk or even probability coupled with the fact that the "Sitting Judges" run against one or more self-selected opponents who have not been evaluated by any objective organization or criteria arguably puts the incumbent judge in an unfair and untenable position. That said, "Sitting Judges" are already unfairly disadvantaged because "judicial evaluations" are now rampant on the web, in Social Media, in newspapers and magazines as well as on cable news.

So, the choice is no longer whether to have a system of Judicial Performance Evaluations which is set up, supervised and managed by a fair and impartial organization or no Judicial Evaluation system at all. Rather, the choice is between a system of Judicial Performance Evaluations administered by a Neutral Organization, whose job it is to manage the system fairly and impartially, and multiple systems set up to move the agenda of an advocacy group, the election of a rival judicial candidate and/or just plain headlines as entertainment for a media outlet or social media network.

Nevertheless, this political reality has produced a strong opposition to the establishment of any official judicial performance evaluations within a significant segment of the judiciary itself as well as many others including prominent citizens and members of the Bar. It is, however, clear that if it were not for the resistance to eliminating contested elections, and a lack of confidence in the ability of the organization doing the evaluating to keep the results confidential, that many judges and those who support measures to select and maintain judges who are most highly professionally qualified would not only support, but participate in the development of standards by which to "judge the judges."

As far back as 1985, the American Bar Association approved and published "Guidelines for Judicial Evaluation." About a dozen states use such evaluations today. Maryland is not one of those twelve states. But the Maryland State Bar Association has, for almost the same quarter of a century, recommended such a program.

The last time the MSBA spoke on the issue was in a report formally issued and "Received" by the Board of Governors on December 20, 1998 by a "Special Committee on Judicial Personal Management," which consisted of representatives of several sections of the MSBA as well as representatives of Local and Specialty Bars. I had the honor and privilege of co-chairing that "Special Committee" with Nell B. Strachan, Esquire, then a Venable Partner for the two years that we respectively chaired The Judicial Administration Section of the State Bar. On that "Special Committee" were the future, now former, Chief Judge of the Court of Appeals, Robert M. Bell as well as future Associate Court of Appeals Judge Sally D. Atkins.

That "Special Committee" reiterated the longstanding position of the MSBA that there should be an ongoing program of judicial evaluations, mandatory and applicable to all judges within the state of Maryland. It further recommended that the responsibility for developing, overseeing, supervising and evaluating this program should be lodged in the Administrative Office of the Courts or an independent contractor hired and paid for by the judiciary. Furthermore, the program should have a "clearly identified administrator, charged with a developing a specific program for data collection, storage, analysis, record keeping, etc."

That recommendation was not implemented or even studied beyond reviewing the results of the pilot programs which preceded it. This was again because of concerns by the Bench and the Bar about maintaining the confidentiality of the data received, particularly during contested elections in this age of the internet. It also reflected a lack of confidence in the ability of the Administrative Office of the Courts to design a fair system that was not unduly influenced by the results of cases decided and/or presided over by the judges being evaluated.

Not much has changed since 1998 or if you prefer 1985. We still have contested elections of circuit court Judges and we still don't have a Program of Judicial Performance Evaluations in the state of Maryland notwithstanding the quarter century of advocacy on both issues by the MSBA. What we do have however is clarity on the issue of whether we can have progress on one without the other. This writer and Senior Judge thinks we can and should. Why?

Judicial accountability is much more of a public issue in the 21st Century than it was in the 20th century. This has produced a number of changes including the ABA updating its "Guidelines for Judicial Evaluation."

These guidelines were updated in several ways for several different purposes. The Lawyers Conference of the Judicial Division of the ABA (the non-judicial branch of The Judicial Division) undertook this task acknowledging that judges themselves could not do so. The original guidelines were designed only for judges running in retention elections. The decision was made to update them in a manner that would make them more universally utilizable whether for self-evaluation, evaluations used within the court system, or other official bodies, bar associations and other public groups.

This "updating" and "improvement" in methodology recognizes the reality that the political climate has changed in a way that should heighten our concern. Public and private interest groups increasingly use their own standards, interests and criteria in some instances blatantly to evaluate judges on the basis of how well the judges' decisions conform to the individuals' or organizations' expectations. The fact that the number of these organizations which evaluate judges in this manner is proliferating makes a more compelling case for a system of Judicial Performance Evaluations which insures that a judge's inclination and ability to follow the rule of law will not be replaced as the primary criteria for evaluation by one that measures how closely the judge's decisions and methods conform with the evaluators' personal or organizational preferences and ideologies.

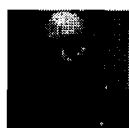
These changes also recognize that the legal system itself has changed in some ways dramatically in the last 15 years. There are many more specialized courts, case management programs, technologies and a much broader mission including "problem solving". This

includes a much greater use of a variety of dispute resolution techniques under the label of ADR. This has resulted in a need to evaluate different courts and judges performing different functions using different tools and criteria. In turn we have increased the use of what the system designers call "behavior-based instruments" (Questions) instead of scaled evaluations of qualities or characteristics. This reduces the chances for result driven evaluations by substituting behavior-based questions such as asking whether the judge "treated all of the parties with dignity and respect" instead of "rating the judge's impartiality on a scale of one to five."

About a dozen states now use what Leonard Post describes as a "New Way to Judge Judges" which I have described here as "Behavior Based Judicial Evaluations." More significantly six of the thirty-nine states with contested judicial elections now publicize official evaluations – Alaska, Arizona, Connecticut, New Mexico, Tennessee, and Utah. In addition, many private organizations to their credit are publishing their own evaluations using these criteria.

So, which comes first, abolishing contested circuit court judicial elections with their campaigns based on irrelevant political and ideological issues and accompanied by campaign financing which at best raises issues adversely affecting the public trust and confidence or establishing a system of Judicial Performance Evaluations providing for true judicial accountability?

I think the latter, establishing a judicial- behavior based system of Judicial Performance Evaluations comes first. Why? Because it's doable and because as they say in politics "you can't beat someone or something with no one or nothing."



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